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NAKAMURA, BRIAN OSBERG, DAVID RHAMY and SHARON UPDIKE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NATIONAL CREDIT UNION  
ADMINISTRATION BOARD AS  
LIQUIDATING AGENT FOR  
WESTERN CORPORATE  
FEDERAL CREDIT UNION,

Plaintiff,

vs.

ROBERT A. SIRAVO, et al.,

Defendants.

No. CV 10-01597 GW (MANx)

**SECOND SUPPLEMENTAL  
REQUEST FOR JUDICIAL NOTICE  
IN SUPPORT OF DEFENDANTS'  
MOTIONS TO DISMISS  
PLAINTIFF'S SECOND AMENDED  
COMPLAINT (DOC. 116)**

Honorable George H. Wu  
Courtroom 10  
312 North Spring Street

Date: July 25, 2011  
Time: 8:30 a.m.  
Courtroom: Los Angeles, 10

Defendants WILLIAM CHENEY, GORDON DAMES, ROBERT H. HARVEY, JR., JAMES JORDAN, TIMOTHY M. KRAMER, ROBIN LENTZ, JOHN M. MERLO, WARREN NAKAMURA, BRIAN OSBERG, DAVID RHAMY and SHARON UPDIKE (the “Director Defendants”) and ROBERT JOHN BURRELL (“Burrell”) hereby request this Court to take judicial notice of the documents attached hereto and referenced as Exhibits 13 and 14.

This supplemental request is made pursuant to Rule 201 of the Federal Rules of Evidence and the authorities cited below. This request is made in connection with the motion to dismiss the Second Amended Complaint, Doc. 116 (“SAC”) filed by the Director Defendants (Doc. 122-23, 135-36) and in connection with the motions to dismiss the SAC filed by Burrell and the other officer defendants (Doc. 119-21, 133-34, 137). This request supplements the Request for Judicial Notice made by the Director Defendants and Burrell (Doc. 123) and the Supplemental Request for Judicial Notice made by the Director Defendants and Burrell (Doc. 140), in which all the other defendants joined.

#### **BASIS FOR REQUESTING JUDICIAL NOTICE**

##### **A. Exhibit 13 – New NCUA Complaint Against RBS Securities, et al.**

On July 18, 2011, after briefing on the pending motions here was completed and the Court held oral argument, the plaintiff herein, the National Credit Union Administration Board, as Liquidating Agent of Western Corporate Federal Credit Union (“NCUA”), filed suit in this Court against RBS Securities, Inc., Greenwich Capital Acceptance, Inc., American Home Mortgage Assets LLC, Indymac MBS, Inc., Lares Asset Securitization, Inc., Nomura Asset Acceptance Corp., Nomura Home Equity Loan, Inc., and Wachovia Mortgage Loan Trust, LLC. A true and correct copy of the NCUA’s complaint is attached hereto as Exhibit 13 (the “RBS Complaint” or “RBS Compl.”). Pleadings and other court documents are properly the subject of judicial notice under Federal Rule of Evidence 201 and may properly be submitted by a supplemental request

1 for judicial notice. *See Mullis v. United States Bankr. Ct.*, 828 F.2d 1385, 1388,  
2 n.9 (9th Cir. 1987).

3 In the *RBS* Complaint – as in the *JP Morgan* Complaint that was the  
4 subject of the Supplemental RJN (Doc. 140) – the NCUA again alleges that the  
5 depositors, issuers and underwriters named as defendants (collectively, the “*RBS*  
6 Defendants”) misled WesCorp into purchasing AAA-rated residential mortgage-  
7 backed securities (“RMBS”) by making misrepresentations and omissions in  
8 registration statements, prospectuses and prospectus supplements, in violation of  
9 Sections 11 and 12(a)(2) of the Securities Act of 1933 and (*inter alia*) Sections  
10 25401 and 25501 of the California Corporations Code. *RBS* Compl. ¶¶ 1-3, 8-9,  
11 13, 14, 44-46, 53, 54, 104, 227-310, 323-328, 333-338, 343-348, 353-358, 363-  
12 368, 373-378, 383-388, 395-400, 404-408. The NCUA alleges that the *RBS*  
13 Defendants misrepresented to WesCorp the quality of the mortgages in the pools  
14 of RMBS and the credit enhancement protections against financial loss. *Id.*  
15 ¶¶ 302, 310, 323-326, 333-336, 343-346, 353-356, 363-366, 373-376, 383-386,  
16 395-398, 404-405. The NCUA also alleges that WesCorp was “not aware of the  
17 untrue statements or omissions” or “did not know of these untruths or omissions”  
18 made by the securities firms “at the time WesCorp purchased the certificates,”  
19 that investors such as WesCorp “had limited or no access to information  
20 concerning the actual quality of loans underlying the RMBS,” and that WesCorp  
21 would not have purchased the securities had it known of the misrepresentations  
22 and omissions. *Id.* ¶¶ 54, 103-106, 323-326, 333-336, 343-346, 353-356, 363-  
23 366, 373-376, 383-386, 395-398.

24 The NCUA’s allegations in the *RBS* case are relevant to this case and to  
25 the arguments made by the Director Defendants in their moving papers (Doc.  
26 122-1, at 7:10-11:16), by the NCUA in its opposition (Doc. 129, at 2:14-22, 9:5-  
27 13) and by the Director Defendants in their reply papers (Doc. 135, at 1:6-9,  
28 13:15-14:2, 16:18-26). In particular but without limitation, the NCUA’s

1 allegations in the *RBS* case are admissions that undercut and render implausible  
2 (within the meaning of *Twombly* and *Iqbal*) the NCUA's allegations in this case  
3 in that the Director Defendants acted "clearly unreasonably" under the  
4 circumstances known to them at the time, and that Burrell and the other officers  
5 acted negligently. *See, e.g.*, Doc. 129 (NCUA's Opposition to Director  
6 Defendants' Motion), at 2:14-22, 9:5-13; Doc. 135 (Director Defendants' Reply),  
7 at 3:23-25, 10:7-18, 16:27-17:13. Because the NCUA now charges others  
8 (namely, the RBS Defendants) with misstating or omitting the risks associated  
9 with RMBS and admits that investors could obtain "limited or no access to  
10 information concerning the actual quality of loans underlying the RMBS" (*RBS*  
11 Compl. ¶ 104), the NCUA's admissions in the *RBS* case render implausible the  
12 NCUA's allegations here that the Director Defendants acted so unreasonably as  
13 to take them outside the Business Judgment Rule and that the Officer Defendants  
14 acted negligently under the circumstances then known.

15 The securities placed at issue by the *RBS* Complaint may represent a  
16 subset of the RMBS attacked by the Second Amended Complaint ("SAC"), Doc.  
17 116 herein – how much of a subset one cannot say, because the SAC does not  
18 specify which RMBS it attacks, describing the RMBS only generically. But if  
19 so, as the NCUA files more and more complaints like the *JP Morgan* Complaint  
20 and the *RBS* Complaint – and the NCUA in its press release says it may end up  
21 filing "a total of five to 10 actions" (Ex. 14, at 1) – the NCUA's admissions will  
22 make it even clearer that the Director Defendants and the Officer Defendants  
23 made decisions based on the information available to them at the time. If that  
24 information was less than the truth, it was, at least according to the NCUA, the  
25 fault of others, and not the fault of the defendants here.

26 Like the allegations of the *JP Morgan* Complaint, other allegations in the  
27 *RBS* Complaint are similarly relevant to the arguments in the motions to dismiss.  
28 The *RBS* Complaint admits that WesCorp's securities purchases were highly

1 rated, mostly AAA. *RBS Compl.* ¶¶ 2, 46, 88; *see, e.g.*, Doc. 135 at 13:15-14:2.  
 2 It also admits that AAA rated securities are the highest rated securities available  
 3 – “the same rating as United States Treasury Bonds . . . .” *RBS Compl.* ¶¶ 2, 44-  
 4 46, 53.

5 A chart collecting examples of relevant admissions – the same as those  
 6 from the *JP Morgan* Complaint – follows:

<i>RBS Compl.</i>	Summary of the NCUA’s Allegations in the <i>RBS</i> Case
¶ 54	“At the time of purchase, WesCorp was not aware of the untrue statements or omissions of material facts in the Offering Documents of the RMBS. If WesCorp had known about the Originators’ pervasive disregard of underwriting standards—contrary to the representations in the Offering Documents—WesCorp would not have purchased the certificates.”
¶ 106	“In sum, the disregard of underwriting standards was pervasive across originators. The failure to adhere to underwriting standards directly contributed to the sharp decline in the quality of mortgages that became part of mortgage pools collateralizing RMBS. The lack of adherence to underwriting standards for the loans underlying RMBS was not disclosed to investors in the offering materials. The nature of the securitization process, with the investor several steps removed from the origination of the mortgages underlying the RMBS, made it difficult for investors to ascertain how the RMBS would perform.”
¶¶ 324-326, ¶¶ 334-336, ¶¶ 344-346, ¶¶ 354-356, ¶¶ 364-366, ¶¶ 374-376, ¶¶ 384-386	“The untrue statements and omitted facts were material because a reasonably prudent investor deciding whether to purchase the Certificates would have viewed them as important and as substantially altering the total mix of information available[.]  “WesCorp purchased the Certificates pursuant to and traceable to the defective registration statement[.]  “At the time WesCorp purchased the Certificates, it did not know of the untrue statements and omissions contained in the registration statement.”

1 In short, the *RBS* Complaint – like the *JP Morgan* Complaint – is properly  
2 the subject of judicial notice and contains admissions by the NCUA that render  
3 implausible its allegations against the defendants here – in particular its  
4 allegation that, given the information available to the defendants at the time  
5 (rather than in hindsight), they should have investigated further or done  
6 something different before investing in securities that had “the same rating as  
7 United States Treasury Bonds . . . .” *RBS* Complaint ¶ 2.

8 **B. Exhibit 14 – NCUA Press Release**

9 Exhibit 14 is a press release by the NCUA announcing the filing of the  
10 *RBS* Complaint; the NCUA issued this press release on July 18, 2011. The Court  
11 may take judicial notice of information and documents that are not subject to  
12 reasonable dispute and that are matters of public record. Fed. R. Evid. 201(b).  
13 The press release is publicly available on the NCUA’s website, see NCUA,  
14 NCUA Files Third Suit in String Against Securities Firms to Recover Billions,  
15 [http://www.ncua.gov/news/press\\_releases/2011/MR11-](http://www.ncua.gov/news/press_releases/2011/MR11-0718NCUAFilesThirdSuit.pdf)  
16 [0718NCUAFilesThirdSuit.pdf](http://www.ncua.gov/news/press_releases/2011/MR11-0718NCUAFilesThirdSuit.pdf), last viewed July 20, 2011 (“press release”).  
17 Because the NCUA created this press release and placed it on its website, it is a  
18 public record properly the subject of judicial notice. *Daniels-Hall v. National*  
19 *Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of  
20 information on approved vendors posted on websites of public school districts).

21 Like the *RBS* Complaint, the press release directly contradicts (and  
22 therefore renders implausible in the *Twombly/Iqbal* sense) the NCUA’s  
23 arguments that the Director Defendants clearly acted unreasonably under the  
24 circumstances as known to them at the time, and that Burrell and the other  
25 officers acted negligently. Indeed, the press release highlights how difficult it  
26 was at the time to foresee problems with mortgage-backed securities. According  
27 to the NCUA, the misrepresentations of the securities firms “caused WesCorp to  
28 believe the risk of loss associated with the investment was minimal, when in fact



1 the risk was substantial. The mortgage-backed securities experienced dramatic,  
2 *unprecedented* declines in value, effectively rendering WesCorp insolvent.”  
3 Ex. 14 (press release), at 181 (emphasis added).

4 The NCUA’s press release is properly the subject of judicial notice, and  
5 shows that the Director Defendants and the Officer Defendants made investment  
6 decisions that seemed prudent, based on the information known at the time, and  
7 only later led to “unprecedented declines in value” – declines in value that the  
8 NCUA itself now attributes material misrepresentations and omissions by  
9 securities firms, rather than any alleged lack of diligence on the part of  
10 WesCorp’s directors and officers.

11 Dated: July 20, 2011.

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26 By /s/ Bruce A. Ericson  
27 Bruce A. Ericson

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2 I, **BRUCE A. ERICSON**, declare:

2. Attached hereto as Exhibit 13 is a true and correct copy of a complaint filed July 18, 2011 by the National Credit Union Administration Board as Liquidating Agent of WesCorp in action no. LACV11-5887 MMM (RZx) (C.D. Cal.), which was obtained from the NCUA's website, [http://www.ncua.gov/news/press\\_releases/2011/MR11-0718ThirdSuitEnclosure.pdf](http://www.ncua.gov/news/press_releases/2011/MR11-0718ThirdSuitEnclosure.pdf), last viewed July 20, 2011.

19 I declare under penalty of perjury under the laws of the State of California  
20 that the foregoing is true and correct.

/s/ Bruce A. Ericson  
Bruce A. Ericson